Filed 6/19/17 P. v. Bayoneta CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. TAUNA MAY BAYONETA, Defendant and Appellant.	C081588 (Super. Ct. Nos. CRF121798 & CRF124178)

In this appeal, defendant Tauna May Bayoneta contends the trial court erred in denying her petition to reduce her conviction for transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a))[1] from a felony to a misdemeanor under the Safe Neighborhoods and Schools Act of 2014 (Proposition 47). Defendant further contends the trial court erred in failing to reduce her conviction for failure to appear (Pen. Code, § 1320, subd. (b)) from a felony to a misdemeanor. We affirm.

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[1] Undesignated statutory references are to the Health and Safety Code.

FACTUAL AND PROCEDURAL BACKGROUND

On May 4, 2012, a traffic stop was conducted on a vehicle driven by defendant.[2] A search of the vehicle revealed a loaded pistol in the engine compartment. Following the stop, defendant admitted that she possessed methamphetamine. It was later determined that the methamphetamine weighed 2.57 grams.

Defendant was charged by complaint with multiple criminal charges in Yolo County case No. CRF121798, including transportation of methamphetamine. (§ 11379, subd. (a).) Several sentence enhancements were also alleged in connection with this offense. Pursuant to a negotiated disposition, defendant pleaded no contest to the transportation of methamphetamine charge (§ 11379) and admitted the allegation she had a prior drug conviction (§ 11370.2, subd. (c)). The remaining charges and allegations were dismissed. Defendant was released on her own recognizance and ordered to appear for sentencing on August 28, 2012.

Defendant failed to appear at the sentencing hearing and was charged by complaint in Yolo County case No. CRF124178 with felony failure to appear after being released on her own recognizance. (Pen. Code, § 1320, subd. (b).) It was also alleged defendant committed a new felony offense after being released on her own recognizance for a prior felony offense. (Pen. Code, § 12022.1, subd. (b).) Defendant pleaded no contest to the failure to appear charge and the enhancement was dismissed.

On December 3, 2012, defendant was sentenced to a term of six years in case No. CRF121798, and to a consecutive sentence of eight months in case No. CRF124178. In each case the trial court imposed a split-sentence; defendant was ordered to serve half her sentence in local custody and the other half on mandatory supervision. Defendant did not file an appeal.

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[2] Because defendant pleaded no contest, the facts recited are taken from the probation officer's report and the plea hearing.

On January 21, 2016, defendant filed a petition to reduce her conviction for transportation of methamphetamine (§ 11379) from a felony to a misdemeanor under Proposition 47. Defendant also requested that her failure to appear conviction be reduced from a felony to a misdemeanor as an "ancillary result" of the reduction of her transportation of methamphetamine conviction. On February 2, 2016, defendant filed a supplemental brief in support of her petition. The district attorney filed an opposition. After hearing arguments from the parties, the trial court denied the petition, stating it was not "convinced" that it had "the authority or should reduce the conviction." This timely appealed followed.[3]

DISCUSSION

A. *Relevant Legal Background*

1. Section 11379

In *People v. Rogers* (1971) 5 Cal.3d 129 (*Rogers*), our Supreme Court held that the offense of transportation of marijuana (former § 11531) did not require "a specific intent to transport contraband for the purpose of sale or distribution, rather than personal use." (*Rogers*, *supra*, at pp. 132, 134.) As the court explained, "Neither the word 'transport,' the defining terms 'carry,' 'convey,' or 'conceal,' nor [former] section 11531 read in its entirety, suggests that the offense is limited to a particular purpose or purposes. [¶] [N]othing in that section exempts transportation . . . of marijuana for personal use. Had the Legislature sought to restrict the offense of transportation to situations involving sale or distribution, it could easily have so provided." (*Rogers*, *supra*, at pp. 134-135.)

In 1972, the Legislature repealed former section 11531 (Stats. 1972, ch. 1407, § 2, p. 2987) and enacted section 11379 (Stats. 1972, ch. 1407, § 3, p. 3022). The new

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[3] Following the imposition of sentence, defendant admitted to violating the terms of her mandatory supervision on three occasions. In March 2016, defendant was ordered to serve the balance of her sentence in county jail.

provision applied to various controlled substances (including methamphetamine), rather than to marijuana in particular, but otherwise the language of the new provision "tracks" the language of the old one. (*People v. Eastman* (1993) 13 Cal.App.4th 668, 675, fn. 7.) Thus, it remained the law in California that the illegal transportation of controlled substances did not require the transportation to be for purposes of sale. (*Id.* at pp. 674-677.)

This changed in 2013, when the Legislature amended section 11379 (eff. Jan. 1, 2014) to add subdivision (c), which provides that "[f]or purposes of this section, 'transports' means to transport for sale." (Stats. 2013, ch. 504, § 2.) As a result of this amendment, transportation of methamphetamine for personal use no longer violates section 11379.

The legislative amendment to section 11379 did not include an explicit savings clause prohibiting retroactive application of the amended statutory language, nor is there any other indication of "clear legislative intent" that the amended statutory language is only to be applied prospectively. (*People v. Rossi* (1976) 18 Cal.3d 295, 299.) Because the amendment benefits a defendant by eliminating criminal liability for drug transportation in cases involving possession for personal use, it must be applied retroactively to any case in which the judgment was not final when the amendment occurred. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*).)

2. Proposition 47

The legislative modification to section 11379 was followed by further modifications to the drug laws of the state enacted by the voters through the initiative process in the fall of 2014. Specifically, "[o]n November 4, 2014, the voters enacted Proposition 47, . . . which went into effect the next day." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers

(crimes that can be punished as either felonies or misdemeanors). Proposition 47 (1) added chapter 33 to the Government Code (§ 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 to the Penal Code, and (3) amended Penal Code sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377. [Citation.]" (*Rivera*, *supra*, at p. 1091.) Proposition 47 did *not* amend section 11379, which, as we have noted, had already been amended by legislative action.

Penal Code section 1170.18, which was added by Proposition 47, is "a new resentencing provision . . . . Under [Penal Code] section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor *under Proposition 47*, may petition for a recall of that sentence and request resentencing in accordance with *the statutes that were added or amended by Proposition 47*.[4] ([Pen. Code,] § 1170.18, subd. (a).) A person who satisfies the criteria in [Penal Code] section 1170.18 shall have his or her sentence recalled and be 'resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' ([Pen. Code,] § 1170.18, subd. (b).)" (*Rivera*, *supra*, 233 Cal.App.4th at p. 1092, italics added.)

Because Penal Code section 1170.18, by its terms, applies only to offenses that were reduced by Proposition 47, and because section 11379 was not amended by Proposition 47, it follows that a defendant is not entitled by the terms of Penal Code

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4 Specifically, Proposition 47 provides as follows: "A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor *under the act that added this section* ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section[s] 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, *as those sections have been amended or added by this act*." (Pen. Code, § 1170.18, subd. (a), italics added.)

section 1170.18 to have a conviction for transporting methamphetamine reduced under Proposition 47.

B. *Defendant was not Entitled to a Reduction of her Transportation of Methamphetamine Conviction*

Defendant appears to acknowledge that, by its own terms, Penal Code section 1170.18 does not apply to her transportation of methamphetamine conviction. However, she contends that this provision applies because the conduct underlying her conviction would have been a misdemeanor under a statute amended by Proposition 47 since her conduct would have made her guilty of simple possession of methamphetamine under section 11377, subdivision (a). Defendant further contends that she is entitled to the benefit of the legislative amendment to section 11379 under *Estrada* because her split sentence did not result in a final judgment, and because Penal Code section 1203.3 authorized the trial court to modify her sentence and reduce her transportation of methamphetamine conviction to a misdemeanor. Finally, defendant argues that she is entitled to the benefit of the legislative amendment to section 11379 because the Legislature intended the amendment to apply to all past convictions as the amendment clarified, rather than changed, existing law, and because due process considerations of fundamental fairness requires invalidation of her conviction for conduct that is no longer criminal.

We reject defendant's contention that Penal Code section 1170.18 applies to her conviction for transportation of methamphetamine. As we previously explained, that provision, by its terms, applies only to offenses that were reduced by Proposition 47. Accordingly, because Proposition 47 did not amend section 11379, defendant is not entitled to have her transportation of methamphetamine conviction reduced to a misdemeanor. None of the cases cited by defendant warrant a contrary result.

We also reject defendant's contention that she is entitled to the benefit of the legislative amendment to section 11379 under the rule of *Estrada* on the ground her split

sentence did not result in a final judgment. In 2011, the Legislature enacted the Criminal Justice Realignment Act, under which certain felons no longer serve their sentences in state prison. (*People v. Scott* (2014) 58 Cal.4th 1415, 1418.) Instead, those felons "serve their sentences either entirely in county jail or partly in county jail and partly under the mandatory supervision of the county probation officer." (*Id*. at pp. 1418-1419.) A sentence to be served partly in county jail and partly under mandatory supervision is known as a "split sentence," and is imposed under section Penal Code section 1170, subdivision (h)(5). That provision states, in relevant part: "[T]he court, when imposing a sentence pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court's discretion. [¶] (B) The portion of a defendant's sentenced term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and, unless otherwise ordered by the court, shall commence upon release from physical custody or an alternative custody program, whichever is later. During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3 [of the Penal Code] . . . ." (Pen. Code, § 1170, subd. (h)(5).) Thus, "mandatory supervision is achieved by suspending execution of the concluding portion of the realigned sentence." (*People v. Borynack* (2015) 238 Cal.App.4th 958, 963.)

"In a criminal case, judgment is rendered when the trial court orally pronounces sentence." (*People v. Karaman* (1992) 4 Cal.4th 335, 344, fn. 9.) Here, the trial court orally pronounced sentence on December 3, 2012. In doing so, it rendered judgment. The judgment became final when defendant did not file an appeal within 60 days from

the date judgment was rendered. (See *People v. Bunn* (2002) 27 Cal.4th 1, 21 [a judgment becomes final when the time for appealing an inferior court decision has expired]; *People v. Mendez* (1999) 19 Cal.4th 1084, 1094 [to appeal from a judgment of conviction, a defendant must file a notice of appeal within 60 days after rendition of judgment].) Our conclusion is not altered by the fact that the trial court suspended execution of the mandatory supervision portion of defendant's sentence. (Pen. Code, § 1170, subd. (h)(5).) In the context of granting probation, a court may impose sentence but suspend its execution. Under these circumstances, "a judgment of conviction has been rendered from which an appeal can be taken . . . ." (*In re Phillips* (1941) 17 Cal.2d 55, 58; see *People v. Howard* (1997) 16 Cal.4th 1081, 1087 ["where a sentence has actually been imposed but its execution suspended, 'The revocation of the suspension of execution of the judgment brings the former judgment into full force and effect . . . .' "].) Logic dictates that the same rule applies in the context of mandatory supervision. Defendant offered no authority warranting a contrary conclusion. Nor does she explain how the trial court's authority to modify the mandatory supervision portion of her sentence impacts the finality of her judgment.[5] Accordingly, because the judgment

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[5] Citing Penal Code section 1203.3, defendant asserts that the trial court should have given her the benefit of the legislative amendment to section 11379. That provision provides, in relevant part, "The court shall . . . have the authority at any time during the term of mandatory supervision pursuant to subparagraph (B) of paragraph (5) of subdivision (h) of [Penal Code] Section 1170 to revoke, modify, or change the conditions of the court's order suspending the execution of the concluding portion of the supervised person's term." (Pen. Code, § 1203.3.) Here, defendant did not file a motion requesting the trial court modify her mandatory supervision under this provision. Instead, she filed a petition to reduce her transportation of methamphetamine conviction from a felony to a misdemeanor under Proposition 47. At the hearing on the petition, defense counsel argued that as long as the court had the authority to modify her mandatory supervision under Penal Code section 1203.3, her sentence was not final for purposes of the rule of retroactivity under *Estrada*. In denying her petition, the trial court rejected this argument. Defendant has not shown that the trial court erred. As we explained above, *Estrada* is inapplicable because defendant's sentence was final long before the legislative

became final long before the effective date of the legislative amendment to section 11379, the rule of retroactivity announced in *Estrada* does not apply.

We also reject defendant's contention that she was entitled to the benefit from the legislative amendment to section 11379 because the Legislature intended the amendment to apply to all past convictions. According to defendant, the 2013 amendment to section 11379 clarified, rather than changed, existing law, and therefore it applied to her even if her conviction was final when the amendment took effect. (See *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922 (*Carter*) ["[a] statute that merely clarifies, rather than changes, existing law is properly applied to transactions predating its enactment"].) In support of this proposition, defendant cites a statement in the legislative history by the author of the bill that led to the amendment in which the author stated that the bill "would clarify the Legislature's intent to only apply felony drug transportation charges to individuals involved in drug trafficking or sales. Currently, an ambiguity in state law allows prosecutors to charge users—who are not in any way involved in drug trafficking—with TWO crimes for simply being in possession of drugs." (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 721 (2013-2014 Reg. Sess.) Apr. 16, 2013, p. 2.) Defendant contends this statement demonstrates that the Legislature's purpose in enacting the amendment was to correct the " 'unjust' and 'absurd' consequences

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amendment to section 11379 took effect in January 2014. Further, to the extent defendant contends that the trial court erred by failing to modify her mandatory supervision under Penal Code section 1203.3, we will not consider this argument because it was not raised below. (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592.) But even if we were to consider the argument, we would conclude that reversal is not warranted. As an initial matter, even assuming the argument was raised at the hearing on defendant's Proposition 47 petition, defendant failed to give the prosecutor the required two-day notice that she was seeking to modify her mandatory supervision under Penal Code section 1203.3. (Pen. Code, § 1203.3, subd. (b)(1).) Moreover, defendant failed to show the trial court abused its discretion. (*People v. Catalan* 228 Cal.App.4th 173, 179 [applying abuse of discretion standard].)

identified by Justice Mosk in his dissenting opinion in . . . *Rogers* . . . when transportation charges are brought against individuals whose purpose is personal use."

Defendant's premise is without merit because the " 'interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts' " and "[w]hen [the California Supreme Court] 'finally and definitively' interprets a statute, the Legislature does not have the power to then state that a later amendment merely declared existing law." (*Carter, supra,* 38 Cal.4th at p. 922.) As we have previously explained, in 1971, the California Supreme Court finally and definitively interpreted the language of former section 11531 as providing that a specific intent to transport drugs for the purpose of sale was not required to violate that statute. (*Rogers, supra,* 5 Cal.3d at pp. 132, 134.) The following year, the Legislature used language virtually identical to that of former section 11531 in making it illegal to transport certain controlled substances in section 11379. (See *People v. Eastman, supra,* 13 Cal.App.4th at p. 675, fn. 7.) Accordingly, even assuming for the sake of argument that defendant properly divines from a single statement made by the bill's author that the intent of the entire Legislature that amended section 11379 in 2013 was to declare that the statute always required transportation for sale, under *Carter* the Legislature did not have the power to make that declaration. Instead, all the Legislature could do was change the law going forward, which it did. Thus, up until the amendment took effect on January 1, 2014, the offense of transporting methamphetamine under section 11379 did not require transportation for sale.

Finally, we will not consider defendant's contention that due process considerations require full retroactive application of the legislative amendment to section 11379. Nor will we consider defendant's argument in her supplemental brief claiming that she is entitled to receive the benefit of the legislative amendment to section 11379 under the test in *People v. Mutch* (1971) 4 Cal.3d 389. Defendant did not raise these arguments in the trial court. (*Perez v. Grajales, supra,* 169 Cal.App.4th at pp. 591-592.) But even if we were to consider the arguments, we would find that they lack merit. None

of the cases cited by defendant convince us that the legislative amendment to section 11379 applies to her.

B. *Defendant was not Entitled to a Reduction of her Failure to Appear Conviction*

Defendant contends the trial court erred in failing to reduce her failure to appear conviction from a felony to a misdemeanor. According to defendant, because her transportation of methamphetamine conviction is subject to a reduction to a misdemeanor "for all purposes," her felony conviction for failure to appear should also be reduced to a misdemeanor since the offense for which she failed to appear can no longer be treated as a felony. This argument is without merit because, as previously explained, defendant is not entitled to a reduction of her transportation of methamphetamine conviction from a felony to a misdemeanor. Moreover, even if a reduction of her transportation conviction was warranted, the trial court did not have authority to reduce defendant's conviction for failure to appear from a felony to a misdemeanor.

We decided this precise issue in *People v. Eandi* (2015) 239 Cal.App.4th 801 (*Eandi*) (review granted Nov. 18, 2015, S229305) and *People v. Perez* (2015) 239 Cal.App.4th 24, 32 (review granted Nov. 18, 2015, S229046). We recognize these decisions are not yet final, but continue to find their reasoning persuasive and cite them pursuant to California Rules of Court, rule 8.1115.

Proposition 47 explicitly reduced a number of specific offenses from felonies to misdemeanors. Penal Code section 1320 is not among those offenses expressly included in the text of Proposition 47. (*Eandi*, *supra*, 239 Cal.App.4th at p. 804, review granted.) "Failure to appear is a crime of deceit that is premised on a defendant's breach of a contractual agreement. [Citation.] Because it is the breach of this promise that is the gist of the offense, the ultimate disposition of the underlying offense is immaterial. [Citation.] As a result, the true question is whether [Proposition 47] has a collateral retroactive effect such that the pending felony drug possession charge at the time of the

breach of promise of failure to appear in [August 2012] became a misdemeanor as a matter law retroactively, thereby negating a necessary statutory element of failure to appear on a felony charge: having been 'charged with . . . the commission of a felony.' [Citation.]" (*Eandi*, *supra*, at p. 805, review granted, italics omitted.) Nothing in either the express language of the initiative or its ballot materials reflects any intent to provide retroactive collateral relief as a matter of law. (*Ibid*., review granted.) In August 2012, when defendant failed to appear, she had pleaded guilty to a felony charge for which she had promised to appear for sentencing. "The initiative did not purport to exercise a power to go back in time and alter the felony status of every affected offense in every context. It merely offered the possibility of a reduction in current punishment for a conviction or a redesignation of the status of completed punishment for a conviction on a petition for a recall of sentence. Prior felony convictions remain such absent a petition; we do not discern . . . any cogent reason why a then pending felony charge should transform to a misdemeanor as a matter of law for purposes of its collateral effect on a different offense." (*Eandi*, *supra*, at pp. 805-806, review granted, italics & fn. omitted.) "[T]he felony status of an offense at the time charges were filed with the trial court remained unchanged notwithstanding the November 2014 enactment [of Proposition 47] . . . ." (*Id*. at p. 806, review granted, italics omitted.)

DISPOSITION

The trial court's order is affirmed.

NICHOLSON, Acting P. J.

We concur:

HULL, J.

MURRAY, J.